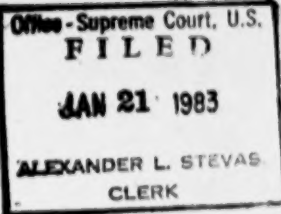


**82-918**  
IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 918



COMMONWEALTH OF PENNSYLVANIA,  
Petitioner  
v.

ANDRE LOVETTE, AND SIMONA LOVETTE,  
Representative of the Estate of  
Andre Lovette, Respondents

---

PETITIONER'S REPLY BRIEF ON  
PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF PENNSYLVANIA

---

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ADDITIONAL QUESTION PRESENTED

Whether a writ of certiorari should issue to determine whether the federal mootness doctrine defeats this Court's jurisdiction and prevents further appellate review, in derogation of public and state interests, where in the state court the respondent, a deceased criminal defendant, and his substituted personal representative, successfully opposed a Petition to Abate his appeal and obtained a favorable result?

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PETITIONER'S REPLY BRIEF ON  
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TO THE SUPREME COURT OF PENNSYLVANIA

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Petitioner, the Commonwealth of Pennsylvania, seeks a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered in this case on October 5, 1982.

SUPPLEMENTAL STATEMENT OF THE CASE

In this reply brief, petitioner, the Commonwealth of Pennsylvania, pursuant to U.S. Sup. Ct. Rule 22.5, addresses only respondents' challenges to the jurisdiction of this Court.

ADDITIONAL REASONS  
FOR GRANTING THE WRIT

RESPONDENTS' ASSERTIONS THAT THIS CASE IS MOOT AND THAT THE DECISION OF THE COURT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND DO NOT VITIATE THIS COURT'S JURISDICTION.

Respondents contend that this Court is without jurisdiction to consider the significant legal issues here presented. Their fervent attempt to avoid this Court's review inadvertently establishes the appropriateness of such review: they raise a substantial additional question which is worthy of this Court's consideration.

The doctrine of mootness, upon which respondents primarily rely to vitiate this Court's jurisdiction, is expressive of the need for antagonistic litigants who will advance vigorous arguments to protect substantive rights and thus focus the issues

presented. Jacobs v. New York, 388 U.S. 431, 87 S. Ct. 2098, Dissenting Opinion of Mr. Justice Douglas (1967). This objective is met here.

Respondents' counsel, the Defender Association of Philadelphia, vigorously sought, in the Pennsylvania Supreme Court, to "vindicate" their client, Andre Lovette, and to reverse his well-warranted burglary conviction despite Lovette's premature demise.<sup>1</sup> When petitioner, the Commonwealth of Pennsylvania, learned of Lovette's death, after full briefing and argument in the Pennsylvania Supreme Court, it promptly filed a Petition to Abate the Appeal. Respondents' counsel, contrary to its present stance, urged that this case be decided on its merits.

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<sup>1</sup> Respondent Andre Lovette died on June 6, 1980, the victim of five (5) gunshot wounds. His defense-requested, discretionary Pennsylvania Supreme Court appeal was orally argued on April 15, 1982.

The Defender Association contended that the legal questions presented "are of vital importance not only to other defendants accused of crimes, but to the general public," and also relied on Simona Lovette's application to be substituted for her deceased son as a party on appeal (Answer to Petition to Abate Appeal, infra at 2A-3A, 4A, 7A-8A; Pa.R.A.P. 502).

Under these circumstances, an actual case or controversy exists, and invocation of the mootness doctrine is, therefore, manifestly inappropriate. Certainly, full briefing and argument on the putative mootness question are warranted. Here uniquely this Court has an opportunity to decide whether a criminal defendant, who obtains post-mortem "vindication" in a state court, can then disingenuously invoke the mootness doctrine to avoid review by this Court. Compare Dove v. United States, 423 U.S. 325, 96 S. Ct. 579 (1976) (death of



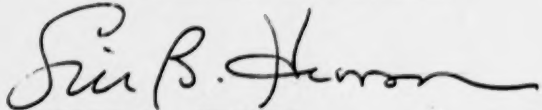
petitioner-defendant during pendency of petition for certiorari resulted in dismissal of petition); Pennsylvania v. Linde, 409 U.S. 1031, 93 S. Ct. 523 (1972) (same where defendant-respondent dies during pendency of petition).

Respondents' alternative attempt to avoid this Court's review, on the ground that the decision below rested upon an adequate and independent state ground, is similarly meritless (see, e.g., Pending Petition at 12). Despite their artifice, they effectively contend only that the decision in question might have been based on non-federal grounds. This Court's jurisdiction, however, is unimpaired "even if the State Constitution would have provided an adequate basis for the judgment," where, as here, the state Supreme Court "did not intend to rest its decision independently on the State Constitution." Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1395 (1979).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in its prior petition, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Eric B. Henson".

ERIC B. HENSON  
Deputy District Attorney  
Law Division  
(Counsel of Record)  
MARK S. GUREVITZ  
Assistant District Attorney  
GAELE McLAUGHLIN BARTHOLD  
Assistant Chief  
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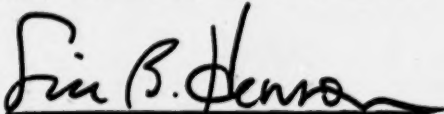
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OCTOBER TERM, 1982  
NO. 918

COMMONWEALTH OF PENNSYLVANIA,  
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v.

ANDRE LOVETTE, AND SIMONA LOVETTE,  
Representative of the Estate of  
Andre Lovette, Respondents

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, ESQUIRE, Counsel  
for Petitioner, Commonwealth of Pennsylvania,  
hereby certify that I have served three (3)  
copies of Petitioner's Reply Brief on Peti-  
tion for Writ of Certiorari to the Supreme  
Court of Pennsylvania by hand delivery upon  
Counsel for Respondents, John W. Packel,  
Esquire, Defender Association of Philadel-  
phia, 121 North Broad Street, Philadelphia,  
Pennsylvania 19107, on January 20, 1983.



ERIC B. HENSON  
Deputy District Attorney  
Law Division  
1300 Chestnut Street  
Philadelphia, Pa. 19107

Sworn to and subscribed :  
before me this 20th day :  
of January, 1983, A.D. :



NOTARY PUBLIC

My Commission Expires:

9/19/83

IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA : JANUARY TERM, 1979

v. :

ANDRE LOVETTE, : NO. 497  
Appellant

ANSWER TO PETITION TO ABATE APPEAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE  
SUPREME COURT:

Andre Lovette, by his attorneys, Leonard Sosnov, Assistant Defender, Elaine DeMasse, Assistant Defender, Deputy Chief, Appeals Division, John W. Packel, Assistant Defender, Chief, Appeals Division, and Benjamin Lerner, Defender, respectfully answers the petition to abate filed in the captioned matter and represents:

1. This answer is in response to, and opposing the Commonwealth's petition to abate the appeal in this case because of the death of the defendant, a fact of which the Commonwealth and defense counsel recently became aware. The Commonwealth's petition was served on defense counsel on July 27, 1982.

2. The Commonwealth's petition to abate this appeal because of the death of the defendant should be denied since this Court, in an opinion by Justice Roberts, held in Com-

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monwealth v. Walker, 447 Pa. 146, 288 A.2d 741 (1972), that the death of a defendant in a criminal case while the case is on appeal does not abate the appeal, as the Commonwealth's motions to abate the appeal and dismiss the appeal in Walker were denied, and this Court proceeded to decide the pending appeal in that case on the merits.\* The holding in Walker, was subsequently explained by Justice Nix in Stauch Estate, 451 Pa. 288, 293-94, 301 A.2d 615, 618 (1973).

In Walker, we rejected a claim that the defendant's death should interrupt the direct appeal procedure. We did so because the completion of the criminal adjudicatory process is of concern to society as a whole. Punishment of the defendant is only one aspect of that concern and there are other aspects which transcend the death of the defendant. An appellate review as to the propriety of the conviction below is necessitated because there are consequences which flow from conviction which extend beyond the death of the defendant.

3. In this particular case, there are important consequences which flow well beyond Andre Lovette or his family. The search and seizure questions involved in the Lovette

---

\* Among other reasons given for this Court's decision in Walker, was the interest of the estate of the deceased in a decision on the merits. The Commonwealth contends that this interest is now completely protected by 18 Pa.C.S.A. §9122 (b)(2). However, the Commonwealth misinterprets this provision, as it does not provide for automatic expungement after the deceased has been dead for three years, as application may then be made, and expungement "may" then be granted, as a court has discretionary power to deny such an application. This provision should be compared with 18 Pa.C.S.A. §9122(a), which provides under other circumstances that the record "shall be expunged".

case are of vital importance not only to other defendants accused of crimes, but to the general public. In this case, an intermediate appellate court has issued an opinion which is binding precedent on the lower courts of this Commonwealth, and which contains a new doctrine which has become known as the Lovette "intermediate response rule". See Commonwealth v. Lumb, Pa. Super., 430 A.2d 1188, 1189 (1981). It is a constitutional question of great public importance whether police may not only stop citizens, but place them in police cars and transport them to another location when there is concededly no probable cause to arrest. The Superior Court ruled that such police conduct is consistent with the constitution, the first time an appellate court in this Commonwealth made such a ruling. Counsel for appellant contended in his petition for allowance of appeal that the Superior Court's decision was contrary to applicable and controlling precedent of both this Court and the United States Supreme Court, and if permitted to stand would legally sanction dragnet and wholesale intrusions into the rights of our citizens. This Court recognized that there were special and important reasons for reviewing this determination and others in this case when it then granted the petition for allowance of appeal. See Rule 1114, Pa.R.App.P. Postponement of the decision of the important issues presented by this case is in nobody's interest since this case is ripe

for decision, having been fully briefed and argued before this Court. See Bursey v. United States, 466 F.2d 1059, 1089 (9th 1972). Thus, a separate and independent ground for not granting the Commonwealth's petition to abate this appeal is the well recognized exception to the mootness doctrines for questions of great public importance. Janet D. v. Carros, 240 Pa. Super. 291, 311, 362 A.2d 1060, 1070 (1976). See In Re Gross, 476 Pa. 203, \_\_\_, 382 A.2d 116, 122-23 (1978); Meyer v. Strouse, 422 Pa. 136, 138, 221 A.2d 191 \_\_\_ (1966).

4. Another independent ground for rejecting the Commonwealth's petition to abate is Rule 502, Pa.R.App.P., which provides for the substitution of a party who becomes deceased on appeal. The personal representative of the deceased may be substituted on appeal, upon application. See City of Newark v. Pulverman, 12 N.J. 105, \_\_\_, 95 A.2d 889, 894 (1953). Attached is the application for substitution as a party by Simona Lovette, defendant's mother and personal representative.

For each and every of the foregoing reasons, the Commonwealth's petition to abate appeal should be denied, and this Court should proceed to decide this case on the merits.

Respectfully submitted,

*Elaine De Masse*

---

LEONARD N. SOSNOV, Assistant Defender  
ELAINE DeMASSE, Assistant Defender  
Deputy Chief, Appeals Division  
JOHN W. PACKEL, Assistant Defender  
Chief, Appeals Division  
BENJAMIN LERNER, Defender



COMMONWEALTH OF PENNSYLVANIA :

:

:

COUNTY OF PHILADELPHIA :

:

A F F I D A V I T

ELAINE DeMASSE , being duly sworn according to law,  
deposes and says that the facts set forth in the foregoing  
petition are true and correct to the best of his/her knowledge,  
or information and belief.

*Elaine De Masse*

ELAINE DeMASSE

Sworn to and subscribed before  
me this 4<sup>th</sup> day of August ,  
1982.

*Joann D. Weikel*  
\_\_\_\_\_  
NOTARY PUBLIC

JOANN D. WEIKEL  
Notary Public, Phila., Phila. Co.  
My Commission Expires Oct. 9, 1982

6A

DEFENDER ASSOCIATION OF PHILADELPHIA  
BY: Benjamin Lerner, Defender, and  
LEONARD SOSNOV, Assistant Defender  
Identification No. 00001  
121 North Broad Street  
Philadelphia, Pa. 19107  
(215) 568-3190

Attorney for ANDRE LOVETTE

COMMONWEALTH OF PENNSYLVANIA

VS.

ANDRE LOVETTE,  
Appellant

IN THE SUPREME COURT OF PENNSYLVANIA - EASTER DISTRICT

JANUARY TERM, 1979

NO. 497

APPLICATION FOR SUBSTITUTION AS A PARTY

Simona Lovette, and counsel for her deceased son, John W. Packel, Assistant Defender, Chief, Appeals Division, Leonard Sosnov, Assistant Defender, Defender Association of Philadelphia, represent as follows:

1. Petitioner, Simona Lovette, is the mother of Andre Lovette, the appellant in the above captioned appeal pending before the Pennsylvania Supreme Court.
2. Andre Lovette, was single, had never married, and died without a will on June 6, 1980. Petitioner is the personal representative of Andre Lovette.

7A

3. Petitioner desires that the appeal of Andre Lovette from his judgment of conviction and sentence be decided by the Pennsylvania Supreme Court. Therefore, petitioner requests that she be substituted for her deceased son as a party before this Court for purpose of this appeal.

Respectfully submitted,

  
SIMONA LOVETTE

COMMONWEALTH OF PENNSYLVANIA :

:

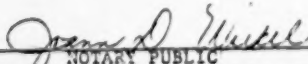
COUNTY OF PHILADELPHIA :

A F F I D A V I T

SIMONA LOVETTE , being duly sworn according to law,  
deposes and says that the facts set forth in the foregoing  
petition are true and correct to the best of his/her knowledge,  
or information and belief.

  
SIMONA LOVETTE

Sworn to and subscribed before  
me this 4<sup>th</sup> day of August ,  
1982.

  
NOTARY PUBLIC  
JOANN D. WEIKEL  
Notary Public, Phila., Phila. Co.  
My Commission Expires Oct. 2, 1983

9A